Munuswamy Sundar Raj v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–105–05 OF 2013(B)
SURIYADI, AHMAD MAAROP, JEFFREY TAN, ABU SAMAH AND RAMLY ALI FCJJ
6 AUGUST 2014

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Criminal Law — Dangerous drugs — Section 39B(1)(a) — Trafficking 20,077.1g of ketamine — Appeal against conviction and sentence — Dangerous drugs found inside bag carried by appellant — Defence of innocent carrier — Whether a valid defence — Whether plea of ignorance sufficient to establish defence of innocent carrier — Whether appellant guilty of willful blindness — Whether mens rea possession established — Whether trafficking established

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Criminal Procedure — Defence — Innocent carrier — Dangerous drugs found inside bag carried by appellant — Whether defence of innocent carrier a valid defence — Whether plea of ignorance sufficient to establish defence of innocent carrier — Whether willful blindness negates defence of innocent carrier

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The appellant was arrested at the Kuala Lumpur International Airport ('KLIA') for carrying a bag containing ketamine. He was later charged with trafficking in 20,077.1g of ketamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). At the end of the prosecution's case the learned trial judge ('judge') reduced the charge to possession whereupon the appellant pleaded guilty and was sentenced to five years imprisonment and fine. The prosecution's appeal to the Court of Appeal was successful and the Court of Appeal ('first Court of Appeal') ordered the defence to be called on the original charge of trafficking. The appellant's defence was that he came from India to Malaysia to meet his relatives and to buy electrical goods. During transit at New Delhi airport, the bag in question was given to him by a person called Faruk, with instructions that it be handed over to a person at KLIA. The appellant claimed he was promised RM2,000 for this service. The judge rejected the defence that the appellant was an innocent carrier. As the appellant did not adduce fresh evidence despite the first Court of Appeal having found mens rea possession, the appellant thus had failed to cast a reasonable doubt on the prosecution's case by depending solely on that defence of innocent carrier. The appellant was thus convicted and sentenced to death. On appeal, the Court of Appeal affirmed the judge's decision and held that the Act did not cater for the defence of 'innocent carrier'. Hence the present appeal by the appellant.

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Held, dismissing the appeal and affirming the conviction and sentence:

(1) The defence of innocent carrier is a valid defence that could be alluded to by an accused person, and in this case the appellant (see para 9.

(2) The success of the defence of innocent carrier depends very much on the facts of each case, a matter that falls within the realm of the trial judge. Ignorance simpliciter is not sufficient to let an accused person off the hook as otherwise every other accused person will allude to that defence. It needs more than that. Without any reason for suspicion, or there is no right or opportunity of examination, ignorance may be a good defence (see para 10).

(3) There was no suggestion by the defence that the appellant had enquired from the person who handed the bag to him. He was in a position to examine the contents of the bag entrusted by Faruk before it was checked in but failed to do so. He was clearly guilty of willful blindness (see para 11).

(4) The judge had clearly addressed his mind to the defence of innocent carrier before concluding that such a defence based on the factual matrix failed to raise any reasonable doubt. The appellant's willful conduct, compounded by his factual impecuniosity, made no sense to his defence hence leading to the inference that he knew the contents of the bag that he carried (see para 13).

(5) As the first Court of Appeal had earlier concluded that the appellant had mens rea possession of the drugs found in the said bag, added with the appellant failing to adduce fresh evidence at the defence stage to rebut that conclusion, the defence of innocent carrier was clearly a non-starter. The credibility of the prosecution's witnesses together with the facts and circumstances of the case established, as opposed to the appellant's unsubstantiated claim that he did not know the contents of the bag, did not create any reasonable doubt in the mind of the judge. The ingredient of trafficking was established (see paras 14–15).

[Bahasa Malaysia summary

Perayu ditangkap di Lapangan Terbang Antarabangsa Kuala Lumpur ('KLIA') kerana membawa beg yang mengandungi ketamin. Dia kemudiannya dituduh dengan mengedar dadah ketamin sebanyak 20,077.1g di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'). Pada akhir kes pihak pendakwaan hakim perbicaraan yang bijaksana ('hakim') mengurangkan tuduhan kepada milikan di mana perayu mengaku bersalah dan dihukum penjara lima tahun dan denda. Rayuan pihak pendakwaan kepada Mahkamah Rayuan adalah berjaya dan Mahkamah Rayuan (Mahkamah Rayuan pertama) memerintahkan pembelaan untuk dipanggil atas tuduhan asal pengedaran. Pembelaan perayu adalah bahawa dia datang dari India ke Malaysia untuk berjumpa dengan saudaranya dan untuk membeli barangan elektrik. Semasa persinggahan di lapangan terbang New Delhi, beg yang dipersoalkan diberi kepadanya oleh

seorang yang bernama Faruk, dengan arahan bahawa ia diserahkan kepada seseorang di KLIA. Perayu mendakwa dia dijanjikan dengan RM2,000 untuk penyerahan ini. Hakim menolak pembelaan perayu adalah pembawa tidak bersalah. Memandangkan perayu tidak mengemukakan keterangan baru walaupun Mahkamah Rayuan pertama telah mendapati milikan *mens rea*, perayu oleh itu gagal untuk melepaskan keraguan munasabah ke atas kes pendakwaan dengan bergantung semata-mata atas pembelaan pembawa tidak bersalah. Perayu oleh itu disabitkan dan dijatuhkan hukuman mati. Atas rayuan, Mahkamah Rayuan mengesahkan keputusan hakim dan memutuskan bahawa Akta tidak memenuhi untuk pembelaan 'innocent carrier'. Maka rayuan ini oleh perayu.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Pembelaan pembawa tidak bersalah adalah pembelaan sah yang boleh dirujuk oleh tertuduh, dan dalam kes ini, perayu (lihat perenggan 9).

(2) Kejayaan pembelaan pembawa tidak bersalah amat bergantung atas fakta setiap kes, perkara yang terangkum dalam bidang kuasa hakim perbicaraan. Kejahilan *simpliciter* bukan mencukupi untuk melepaskan tertuduh daripada kesalahan jika tidak setiap tertuduh yang lain akan merujuk kepada pembelaan tersebut. Ia memerlukan lebih daripada itu. Tanpa apa-apa sebab untuk mengesyaki, atau tidak terdapat hak atau peluang pemeriksaan, kejahilan mungkin menjadi pembelaan yang baik (lihat perenggan 10).

(3) Tidak terdapat cadangan oleh pihak pembelaan bahawa perayu telah bertanya daripada orang yang menyerahkan beg tersebut kepadanya. Dia dalam kedudukan untuk memeriksa isi kandungan beg yang diamanahkan oleh Faruk sebelum ia didaftarkan masuk tetapi gagal berbuat sedemikian. Dia jelas bersalah kebutaan sengaja (lihat perenggan 11).

(4) Hakim secara jelas mengarahkan mindanya kepada pembelaan pembawa tidak bersalah sebelum memutuskan bahawa pembelaan sedemikian berdasarkan fakta matriks gagal untuk membangkitkan apa-apa keraguan munasabah. Tingkah laku sengaja perayu, diburukkan lagi dengan fakta keadaan tidak berwangnya, tidak masuk akal kepada pembelaanya maka membawa kepada inferens bahawa yang dia tahu mengenai kandungan beg yang dibawanya (lihat perenggan 13).

(5) Memandangkan Mahkamah Rayuan pertama telah sebelumnya memutuskan bahawa perayu mempunyai milikan mens rea dadah yang dijumpai di dalam beg tersebut, tambahan lagi dengan kegagalan perayu untuk mengemukakan keterangan baru di peringkat pembelaan untuk mematahkan kesimpulan tersebut, pembelaan pembawa tidak bersalah adalah jelas tidak boleh digunakan. Kredibiliti saksi pendakwaan

A bersama dengan fakta dan keadaan kes dibuktikan, bertentangan tuntutan tidak berasas perayu bahawa dia tidak tahu mengenai kandungan beg tersebut, tidak membentuk apa-apa keraguan munasabah dalam minda hakim. Bahan pengedaran dibuktikan (lihat perenggan 14–15).]

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Notes

For cases on defence in general, see 5(2) *Mallal's Digest* (5th Ed, 2015) paras 2048–2170.

C For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 400–608.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
D *Hoh Bon Tong v PP* [2010] 5 CLJ 240, CA (refd)
Marlan Marpaung v PP [2013] 1 MLJ 108; [2012] 8 CLJ 41, CA (refd)
PP v Amil bin Akmad [2007] 5 MLJ 561, CA (refd)
Venkatesan Chinnasami v PP [2011] 1 LNS 1736, CA (refd)

E **Legislation referred to**

Dangerous Drugs Act 1952 ss 2, 39B(1)(a)

Appeal from: Criminal Appeal No B-05–279–10 of 2011 (Court of Appeal, Putrajaya)

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Baljit Singh Sidhu (Mahendran Naidu with him) (Shukor Baljit & Partners) for the appellant.
Muhamad Iskandar bin Ahmad (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

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Suriyadi FCJ (delivering judgment of the court):

[1] The appellant was arrested at the Unit Khas Pemeriksaan Penumpang ('UKPP') of the Kuala Lumpur International Airport ('KLIA') for carrying a
H bag containing two boxes, later found to contain ketamine. He was later charged with trafficking in 20,077.1g of ketamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act').

[2] At the end of the prosecution's case the High Court reduced the charge to
I possession whereupon the appellant pleaded guilty and sentenced to five years imprisonment and fine. Being dissatisfied the prosecution appealed to the Court of Appeal. The appeal was successful and the Court of Appeal (first Court of Appeal) ordered the defence to be called on the original charge of trafficking.

[3] At the defence stage at the High Court the appellant's defence was as follows. He came to Malaysia to meet his relatives and to buy electrical goods. His journey began at Chennai. From there he took a train to Bombay. He then flew down and transited at New Delhi airport. At the New Delhi airport, before flying off to KLIA that impugned bag was given to him by a person called Faruk, with the follow-up instruction that it be handed over to a person at KLIA. For that alleged simple service he was promised RM2000. He eventually arrived at his final destination ie KLIA whereat he was arrested.

[4] The learned trial judge however rejected the appellant's defence that he was an innocent carrier, which would have entitled him to an acquittal. As the appellant did not adduce fresh evidence despite the first Court of Appeal having found mens rea possession, the appellant thus had failed to cast a reasonable doubt on the prosecution's case by depending solely on that defence of innocent carrier. The learned judge in the course of sifting through the total evidence, inter alia, stated that it was not reasonable to have been paid RM2,000 for that alleged service, let alone he had insufficient money to buy the electrical goods here. The appellant thereupon was convicted and sentenced to death for trafficking as per the original charge.

[5] On appeal filed at the Court of Appeal the decision of the learned judge was affirmed. In the course of dismissing the appeal the Court of Appeal held that the Act did not cater for the defence of 'innocent carrier'. More of this erroneous view later. Being dissatisfied with the decision the appellant appealed to us.

[6] It must be reminded that the High Court in this case had heard the defence premised on the instruction of the first Court of Appeal to have the case heard based on the original charge. In ordinary parlance the first Court of Appeal was satisfied that the prosecution had successfully proven the element of custody, control, knowledge and the ingredient of trafficking in favour of the prosecution. It was common ground that the first Court of Appeal had never alluded to any presumptive provision when concluding that a prima facie case of trafficking as per the charge had been established. With such an order meted down to hear the defence there was absolutely no necessity for the learned judge to reopen the matter and decide again whether a prima facie case had indeed been established. All that was needed was for the learned judge to acquiesce to the order of the superior court and to test that prima facie case against any evidence adduced by the appellant at the end of the trial. In other words the learned judge must undertake a maximum evaluation of the evidence (*Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85). This the learned judge did. He analysed the total evidence adduced in the course of the trial in order to ascertain the substantive defence of innocent carrier. As said above, with no fresh evidence to substantiate his defence of being an innocent

carrier the appellant was eventually found guilty, convicted and sentenced to death for trafficking as per the charge.

ISSUE OF INNOCENT CARRIER

[7] On the issue of innocent carrier the Court of Appeal in its grounds of judgment at p 2 (para 3) had authored the following:

> We must at the outset say the Dangerous Drugs Act 1952 does not cater for defence of 'innocent carrier', per se ie innocent carrier is not a defence known to law.

[8] At p 13 (para 16) again the Court of Appeal stated:

> As we have stated earlier there is no defence known to law as asserted by the learned counsel for the appellant ie the defence of innocent carrier.

[9] We were rather perturbed by the above remarks as that is not the correct proposition of law in drug trafficking cases. The defence of innocent carrier is a valid defence that could be alluded to by an accused person, and in this case the appellant. A plethora of cases sprinkles the legal journals in Malaysia and suffice if we merely refer to a chosen few to clarify this defence without the need for comprehensive judicial activism. The Court of Appeal in *Venkatesan Chinnasami v Public Prosecutor* [2011] 1 LNS 1736 put it aptly in the following terms:

> ... A defence of innocent carrier refers to a state of affairs where an accused person acknowledges carrying, for example a bag or a box, as in the case before us, containing the dangerous drugs but disputes having knowledge of the drugs. Whether it will succeed or not would very much depend on the facts of each case.

[10] As said above it is imperative that the success of the defence of innocent carrier depends very much on the facts of each case, a matter that falls within the realm of the trial judge. Ignorance simpliciter is not sufficient to let an accused person off the hook as otherwise every other accused person will allude to that defence. It needs more than that. Without any reason for suspicion, or there is no right or opportunity of examination, ignorance may be a good defence. A hypothetical scenario could be when an accused person receives a package which contains illicit drugs from say, England when not a shred of evidence could establish him having been aware of the circumstances of the drugs being sent to him or having any nexus to him. Prior to the parcel appearing at his door step he would not have had any reason for suspicion or the opportunity to inspect the parcel bearing in mind that the package was beyond his reach until it reached his hands. The rider is that everything depends on the facts.

[11] Let us now peruse briefly at the relevant parts of the evidence regarding the current case where every opportunity was made available to the appellant to inspect the bag. It was noticeable that there was no suggestion by the defence that the appellant had enquired from the person who handed the two boxes to him or such a suggestion was made to any of the prosecution's witnesses of the contents. He was in a position to examine the contents of the bag entrusted by that Faruk before it was checked in but failed to do so. He was clearly guilty of willful blindness (see *Hoh Bon Tong v Public Prosecutor* [2010] 5 CLJ 240 (CA) and *Public Prosecutor v Amil bin Akmad* [2007] 5 MLJ 561 (CA)). In *Hoh Bon Tong v Public Prosecutor* when discussing this defence held that:

> The defence of innocent carrier must necessarily bring into the picture the concept of willful blindness. And according to Yong Pung How CJ (Singapore) in *Public Prosecutor v Hla Win* [1995] 2 SLR 424 (at p 438), 'the concept of wilful blindness qualifies the requirement of knowledge'. And His Lordship continued further by saying (at the same page):
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> > As Professor Glanville Williams aptly remarked in his *Texbook* on *Criminal Law*, at p 125:
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> > > ... the strict requirement of knowledge is qualified by the doctrine of willful blindness. This is meant to deal with those whose philosophy is: 'Where ignorance is bliss, 'tis folly to be wise.' To argue away inconvenient truth is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know,' he is taken to know'.
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> Continuing at the same page, His Lordship said:
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> > In *Ubaka v PP* [1995] 1 SLR 267, the principles laid down in *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356; [1968] 2 WLR 1303 and modified in *Tan Ah Tee v PP* [1980] 1 MLJ 49 were applied by the trial judge. In its grounds of judgment, this court quoted the following passage by the trial judge:
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> > > Ignorance is a defence when there is no reason for suspicion and no right and opportunity of examination, and ignorance *simpliciter* is not enough.

[12] In order not to throttle the discretion of judges, let alone no cases are similar, we are loath to lay down restrictive guidelines for courts to consider prior to deciding whether the defence of innocent carrier can prevail. We leave it to the better judgment of the presiding judge. In the case of *Marlan Marpaung v Public Prosecutor* [2013] 1 MLJ 108; [2012] 8 CLJ 41 the court had occasion to say:

> The defence of the appellant cannot stand in isolation. It must be determined by reference to the facts and circumstances prevailing in each particular case (*Ridwan v PP* [2010] 4 CLJ 570; *Hoh Bon Tong v PP* [2010] 5 CLJ 240; and *Wong Vui Chin v PP* [2009] MLJU 1703; [2011] 3 CLJ 383). In our judgment, the appellant could not avail himself of the defence of innocent carrier because there was ample evidence to show that the appellant had knowledge of the drugs that he was

carrying. The contemporaneous conduct of the appellant by fleeing the scene and putting up a struggle with the police party before the discovery of the drugs would have a direct bearing on the facts in issue and would have certainly damaged or whittled away the presumption of innocence on the part of the appellant. A reasonable tribunal appraised of the facts and after hearing this appeal would have concluded that the appellant was not an innocent carrier and that the appellant knew that he was carrying the drugs in the black plastic bag (exh 'P24') for the purpose of trafficking.

[13] Appraising his written grounds, the learned judge in the current appeal had clearly addressed his mind to the defence of innocent carrier before concluding that such a defence based on the factual matrix failed to raise any reasonable doubt. He had clearly given consideration to the character of Faruk raised by the appellant, the illogicality of the appellant being promised RM2,000 for such an easy task (a factor which conspicuously weighed heavily in his mind), let alone there was insufficient money found on him to buy the electrical goods. The appellant's willful conduct, compounded by his factual impecuniosity, made no sense to his defence hence leading to the inference that he knew the contents of the bag that he carried.

[14] To summarise the total picture, as the first Court of Appeal had earlier concluded that the appellant had mens rea possession of the drugs found in the said bag, what with the appellant failing to adduce fresh evidence at the defence stage to rebut that conclusion, the defence of innocent carrier was clearly a non-starter. The credibility of the prosecution's witnesses together with the facts and circumstances of the case established, as opposed to the appellant's unsubstantiated claim that he did not know the contents of the bag, did not create any reasonable doubt in the mind of the learned judge.

[15] The ingredient of trafficking was established when the appellant carried the drugs from New Delhi airport to Kuala Lumpur (see s 2 of the Act).

OUR DECISION

[16] Having heard the submissions from the contending parties, we found that the learned trial judge had not misdirected himself on the law. He had adequately considered the evidence both for the prosecution and the defence carefully in the course of his maximum evaluation, and had meticulously supplied his reasons as to why the prosecution's evidence was accepted over the defence, and why the solitary defence of innocent carrier was rejected. We found the conviction and sentence as imposed by the High Court safe as affirmed by the Court of Appeal subsequently. We saw no reason to interfere with the finding of facts of both courts except to rectify the erroneous view held by the Court of Appeal on the proposition of law regarding the defence of

innocent carrier. But it must be clarified that despite the unintended error of the Court of Appeal the eventual decision was correct.

[17] We accordingly dismissed the appeal and confirmed the conviction and sentence meted down by the High Court and confirmed by the Court of Appeal.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum